



Clause 4.6 Variation Request

Botany Bay Local
Environmental Plan 2013 –
Clause 4.4 - Height of
buildings

23-25 Church Avenue & 16-18 John St, Mascot

Submitted to Bayside Council

On Behalf of Da Vito Ferro Apartments P/L

March 2020

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1. EXECUTIVE SUMMARY

This Clause 4.6 variation request has been prepared in relation to Clause 4.3 (Height of Buildings) of Botany Bay Local Environmental Plan 2013 for a development application at 23-25 Church Avenue and 16-18 John St, Mascot. The development application seeks consent for a fourteen (14) storey mixed use development, with four (4) levels of basement car parking.

Clause 4.3 prescribes that the maximum height for a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map. The Height of Building map specifies a maximum building height of 44m for development on the subject site, which the proposed building partially exceeds Building A at a maximum height 46.5m and Building B at a maximum height of 45.8m. The maximum variation relates to the lift overrun providing resident access to the rooftop communal open space on both buildings and the communal open space on Building A.

The non-compliant portion has an area of 220m² on Building A and 21m² at Building B. Notwithstanding the minor variation, the objectives of the development standard are achieved and therefore compliance with the standard is unreasonable and unnecessary. The non-complaint element is centrally located within the footprint of the building minimising its visual impact. It will not change the predominate bulk and scale of the building. The shadow it casts, falls within shadows of the lower compliant sections of the building. The proposed variation will not cause any adverse environmental impacts and is acceptable.

In this regard there are sufficient environmental planning grounds to justify the variation.

2. INTRODUCTION

This is a formal request that has been prepared in accordance with clause 4.6 of the Botany Bay Local Environmental Plan 2013 to justify a variation to the Height of buildings development standard prescribed in Clause 4.3 of that plan. The request relates to a development application submitted to Bayside Council for construction of a fourteen (14) storey mixed use development at 23-25 Church Avenue and 16-18 John St, Mascot.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

This request is structured to explicitly address the matters required to be addressed by the applicant under Clause 4.6(3) (a) and (b) for which the consent authority must be indirectly satisfied according to *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23] and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80]. This request also addresses the matters in Sections 4.6 (4) and (5) regarding which the consent authority and delegate of the Secretary must directly form their own opinion of satisfaction.

3. STANDARD TO BE VARIED

The standard that is proposed to be varied is the Height of buildings development standard which is set out in clause 4.3 (2) of the Botany Bay Local Environmental Plan 2013 (BBLEP 2013) as follows:

4.3 Height of buildings

The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

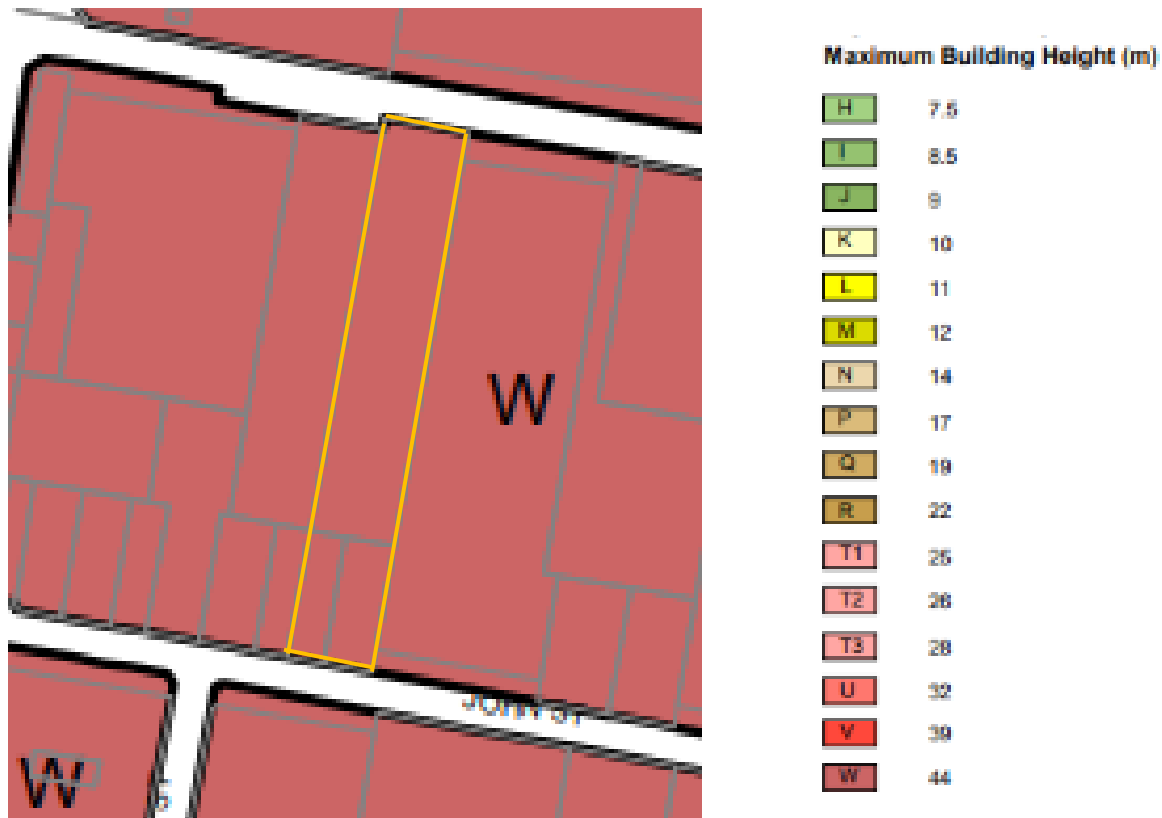


Figure 1: Extract of Height of Buildings Map (Source: NSW legislation)

The numerical value of the development standard applicable in this instance is 44m.

The development standard to be varied is not excluded from the operation of clause 4.6 of the BBLEP 2013.

4. EXTENT OF VARIATION

Clause 4.3 (2) of the LEP prescribes a maximum building height of 44m for the subject site. This application seeks consent for a maximum building height of:

- 46.5m at the lift overrun of Building A, representing 2.5m, 5.7% variation from the development standard, and affects 220m² of the roof area; and
- 45.8m at the lift overrun of Building B, representing 1.8m, 4.1% variation from the development standard and affects 21m² of the roof area.



Figure 2 Diagram illustrating building height control and area of non-compliance at Building A and B

5. UNREASONABLE OR UNNECESSARY

In this section we demonstrate why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by clause 4.6(3)(a) of the LEP.

The Court has held that there at least five different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]).

We have considered each of the ways as follows.

5.1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

In the following table we have considered how the elements which contravene the development standard achieve the objectives of the development standard notwithstanding the variation.

Table 1: Achievement of Objectives of Clause 4.3 of BBLEP 2013.

Objective	Discussion
(a) to ensure that the built form of Botany Bay develops in a coordinated and cohesive manner	Mascot town centre is an urban renewal precinct created through the revitalisation of industrial lands. Significant portions of the Precinct have been redeveloped, with the subject site one of two that are undeveloped within the street block. The proposed variation will permit development of the site in a coordinated and manner, consistent with surrounding new developments.
(b) to ensure that taller buildings are appropriately located	Mascot town centre is characterised by high-density mixed-use buildings, centred on Bourke St and Mascot railway station. The subject site is centrally located within the town centre, with surrounding buildings 5 – 13 storeys in height. The proposed building can be accommodated within that context and as such the building is appropriately located.
(c) to ensure that building height is consistent with the desired future character of an area	The non-compliant portion does not change the character of the building, with the predominant bulk and scale set by the compliant portions of the building.
(d) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,	The non-compliant portion is centrally located within the building footprint and the shadows it casts fall within those of the lower compliant section of the buildings. It is a non-habitable operational space the use of which will not cause any loss of privacy. The adjoining development to the south 19 John St, looks across the subject site to obtain views of the city skyline. The views corridor extends across the

Objective	Discussion
	full length of the site from the rear boundary. Figure 3 illustrates the existing view. Figure 4 shows that those views will be obstruct by Building A, but not the non-compliant portion of Building A. Figure 5 illustrates the visual impact from the erection of Building B. The non-compliant portion is blocked from view by the lower height compliant portions of the building and is not readily discernible in this regard.
(e) to ensure that buildings do not adversely affect the streetscape, skyline or landscape when viewed from adjoining roads and other public places such as parks, and community facilities.	The non-compliant portion is setback 22m from the future John St property, and views of it from the street will be obstructed by the building below.

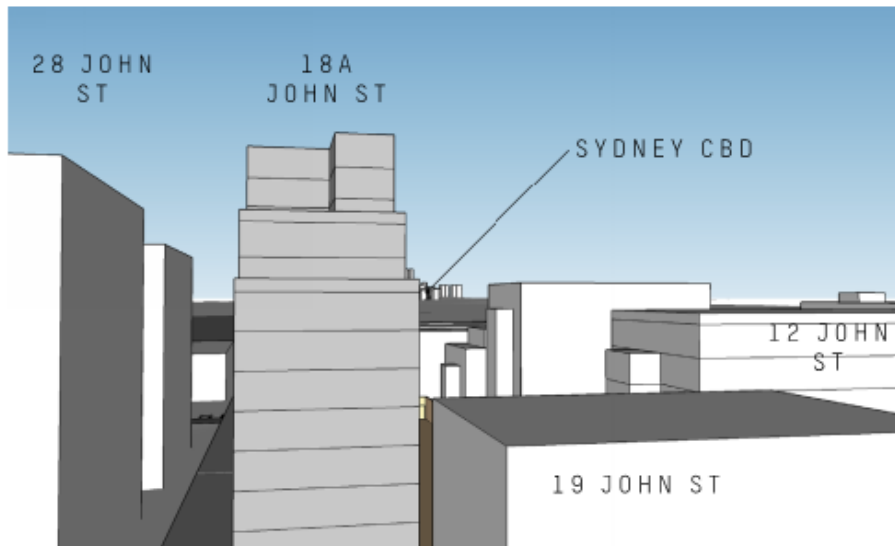


Figure 3: Existing view looking north (Source: DA Design Report, 2 October 2019 by Squillace Architects)

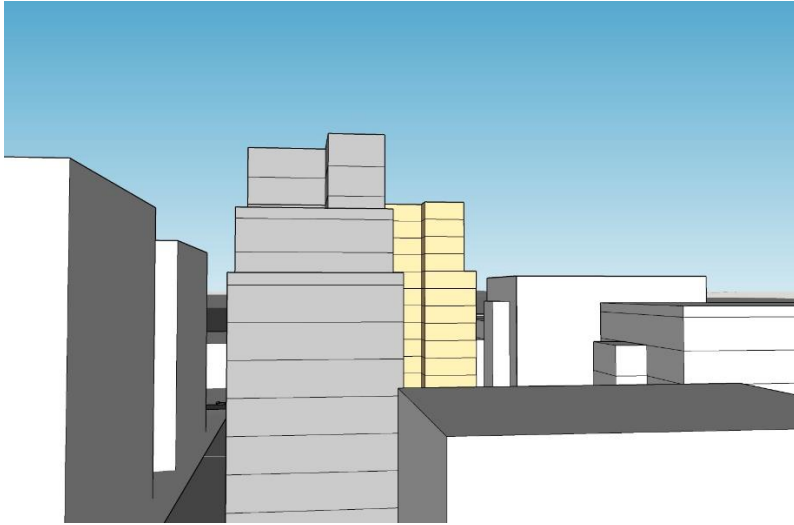


Figure 4: Impact of Building A – View obstructed (Source: Squillace Architects)

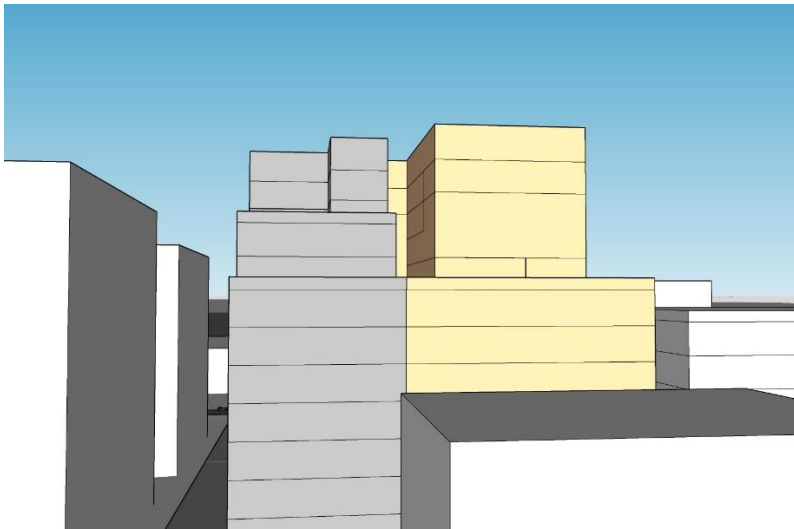


Figure 5: View looking north with both Buildings A and B (Source: Squillace Architects)

As demonstrated in Table 1 above, the objectives of the Building Height development standard are achieved notwithstanding the proposed variation.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, therefore, compliance with a development standard is demonstrated to be unreasonable or unnecessary on this way alone.

For the sake of completeness, we consider the other recognised ways as follows.

5.2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;

On this occasion we do not believe that the underlying objective or purpose is not relevant to the development and therefore we do not rely on this reason.

5.3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.

We do not consider the objective would be defeated or thwarted if compliance was required, even though we have demonstrated above that the objectives of the standard are also achieved by the elements that do not comply with the development standard. In this regard we do not rely on this reason.

5.4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; or

We do not rely on this reason.

5.5. The zoning of the land is unreasonable or inappropriate.

We do not consider the zoning of the land is unreasonable or inappropriate and therefore we do not rely on this reason.

6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

In this section we demonstrate that there are sufficient environmental planning grounds to justify contravening the Height of buildings development standard as required by clause 4.6(3)(b) of the LEP.

We note that in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard.

We also note that in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

As discussed in Section 4, it is the lift overrun of Building A and B, and the communal open space of Building A which contravenes the height of buildings development standard. The non-compliant section has an area of 220m² at Building A and 21m² at Building B.

The proposed variation is minor in scope and causes no additional amenity impacts. The non-compliant section is centrally located within the footprint of both buildings, minimising its visibility from the surrounding area. The lift overrun facilitates equitable access to the rooftop communal open space in both buildings and in this regard promotes good design and amenity of the built environment. Owing to the high-density town centre location of the site, the rooftop is the most appropriate place to provide quality communal space.

7. PUBLIC INTEREST

In this section we explain how the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out as required of the consent authority by clause 4.6(4)(a)(ii) of the LEP.

In section 5 it was demonstrated that the objectives of the development standard are achieved notwithstanding the variation of the development standard. For the same reasons, we consider that the development as a whole is consistent with these objectives.

The table below considers whether the proposal is also consistent with the objectives of the zone.

Table 2: Consistency with Zone Objectives.

B4 Mixed Use	
Objectives of Zone	Discussion
To provide a mixture of compatible land uses.	The proposed mixed-use development incorporates high density residential, a retail spaces, and a warehouse that is planned for future use as a providore (subject to separate DA). The uses are low intensity and their operation will not interfere with other land uses.
To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.	The proposed mixed-use development incorporates a retail and warehouse space at ground level. The proposed spaces are a short distance from the Mascot train station and bus services and as such are readily accessible by public or passive private transport.

As demonstrated in Table 2, the proposal is consistent with the objectives of the zone and in Section 5 it was demonstrated that the proposal is consistent with the objectives of the development standard. According to clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

8. CONCLUSION

This submission requests a variation, under clause 4.6 of the Botany Bay Local Environmental Plan 2013, to Height of Buildings development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development because the development achieves the objectives notwithstanding the variation; and
- There are sufficient environmental planning grounds to justify the contravention.

We submit that the consent authority can be satisfied to the above and that the development achieves the objectives of the development standard and is consistent with the objectives of Zone name and is therefore in the public interest. We note that the concurrence of the Secretary can be assumed in accordance with Planning Circular PS 18-003. Or if concurrence cannot be assumed, replace the preceding sentence with:

On this basis, therefore, it is appropriate to exercise the flexibility provided by clause 4.6 in the circumstances of this application.